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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICKY WHITE, Defendant and Appellant.	B229271 (Los Angeles County Super. Ct. No. BA298229)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alex Ricciardulli, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In a previous appeal, this court reversed a judgment of conviction against defendant Ricky White for selling cocaine base (Health & Saf. Code, § 11352, subd. (a)) and remanded to the trial court for a determination whether denial of *Pitchess*[1] disclosure caused prejudice to White, i.e. whether there was a reasonable probability that the outcome of White's trial would have been different had the information originally been disclosed. After ordering disclosure of *Pitchess* records and conducting a hearing, the trial court found no prejudice and reinstated the judgment of conviction, from which judgment defendant White now appeals.

In this appeal, we agree with the trial court that calling three additional police officers to testify would support the prosecution case, which would subtract from any impeachment value the defense could obtain from those witnesses. The trial court properly ruled that the minimal probative value of evidence from 11 *Pitchess* witnesses was outweighed by the probability that its admission would necessitate undue consumption of time under Evidence Code section 352. We find no error in the trial court's determination that the evidence against White was overwhelming. We also conclude that White did not meet his burden of showing prejudice from the denial of *Pitchess* disclosure, and we conclude that there was no reasonable probability that the outcome of White's trial would have been different had the information originally been disclosed. We therefore affirm the judgment of conviction.

FACTUAL AND PROCEDURAL HISTORY

By an amended information, defendant Ricky White was charged with selling cocaine base (Health & Saf. Code, § 11352, subd. (a)). The information also alleged that White suffered two prior serious or violent felony convictions (Pen. Code, §§ 667, subds. (b) – (i) & 1170.12, subds. (a) – (d)) and served two prior prison terms (Pen. Code, § 667, subd. (b)). The prosecutor elected to treat the case as a second-strike case.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

White represented himself in propria persona. Before trial White filed a motion to disclose police personnel records pursuant to *Pitchess v. Superior Court, supra*, 11 Cal.3d 531. The motion sought an order requiring the Los Angeles Police Department to make available all complaints relating to (1) acts of racial, gender, ethnic, and sexual orientation bias, coercive conduct, or violation of constitutional rights; (2) fabrication of charges, evidence, and reasonable suspicion and/or probable cause, illegal search and seizure, false arrest, perjury, dishonesty, writing false police reports, and planting evidence; and (3) false or misleading internal reports, including medical reports, and any other evidence of misconduct amounting to moral turpitude. The motion sought these records and related documents and information from personnel files of officers Tapia, Ledesma, Mejia, Gonzalez, Hoffman, Green, Brown, Chapman, Reyes, Pozo, Luna, Feldtz, and Hodges. The trial court denied the motion for failure to make an adequate showing.

Trial:

Prosecution Evidence: On February 16, 2006, Los Angeles Police Officers Tapia and Ledesma, assigned to Central Division Narcotics, conducted narcotics surveillance of Fifth Street between San Pedro and Towne from an observation post. If they saw what they believed to be a narcotics transaction, Tapia and Ledesma would notify "chase" officers, who would detain suspects.

At about 2:30 p.m., Tapia and Ledesma observed defendant White standing west of a hotel entrance and saw Cassandra Aderigibhe approach White and give him paper money, which White put in his pocket. White then opened his left hand, revealing a plastic bindle containing off-white solids that the officers believed were narcotics. Holding a black plastic bag in his right hand, White took some of the solids from his left hand and placed them in Aderigibhe's left hand. Aderigibhe examined the substances, closed her hand, and walked away. Holding the plastic bindle and the black plastic bag, White walked away in a different direction. Tapia and Ledesma notified chase officers to detain Aderigibhe and White. Officers Green and Gonzalez detained Aderigibhe, from whom they recovered .08 grams of cocaine base.

Tapia continued to observe White until he walked behind a truck. Uniformed Officers Mejia and Hoffman went to the area, where White was the only person who fit the broadcast description of the narcotics seller. Mejia testified that White saw the officers approach and discarded the black plastic bag on the sidewalk. Gonzalez, who also saw White do this, retrieved the black plastic bag, which contained currency in small denominations.

Mejia and Hoffman detained White, searched him, and recovered 2.53 grams of cocaine base from his left hand, $25 from his left pants pocket, and $19 from his right front pants pocket.

Defense Evidence: Defendant White testified that he was at Fifth and Main with his wife and went across the street to get tickets for a concert. White was not selling drugs and never had a black plastic bag. Officers Mejia and Hoffman detained him, and Mejia bent White's left thumb back and put drugs in his hand. White suggested that the police planted the black plastic bag on him at the police station.

Edward Hall, who had suffered numerous convictions, testified that Hoffman, Green, Mejia, and Brown part of an organization of police officers that framed people, fabricated evidence, and regularly committed perjury. Hall testified that in the incident underlying his 2006 conviction, Mejia falsely testified that using binoculars, he saw Hall conduct a narcotics transaction at Fifth and Main. Mejia caused Green to detain Hall, repeatedly ordered Green to search Hall, and although Green found no narcotics on Hall, Mejia told Green to take Hall to the police station. Evidence was planted on Hall, and Mejia fabricated the police report. Mejia, Brown, and Hoffman testified against Hall at his trial. Green refused to appear at Hall's trial. Hall was wrongly convicted.

Troy Gray, who had suffered numerous convictions, testified that Tapia, Ledesma, and Green had been known to lie and plant drugs. Gray testified that in the incident underlying his 2007 conviction, he was arrested on Fifth and Crocker in October 2005. Although Tapia and Ledesma were not the arresting officers, they were present and Gray was illegally detained and searched as a result of orders given by Tapia and Ledesma.

The arresting officers planted drugs on Gray. Gray was in custody at the time of White's arrest in this case.

Rebuttal Evidence: Mejia testified that in July 2005, using binoculars he saw Hall standing on Fifth and Main with a female. Two males approached Hall and the female. Hall appeared to sell cocaine base to one of the males and gave the money to the female.

Following a jury trial, the jury convicted White as charged, and found the prior conviction and prior prison allegations to be true. The trial court sentenced White to prison for eight years.

Appeal, Conditional Reversal, and Remand:

White appealed from the judgment of conviction. In that appeal, this court determined that White's *Pitchess* motion made the requisite good cause showing seeking personnel files of eight police officers, namely Officers Tapia, Ledesma, Mejia, Gonzalez, Brown, Chapman, Reyes, and Pozo, relating to fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, false arrest, perjury, dishonesty, writing of false police reports, and planting of evidence. Consequently this court held that the trial court's summary denial of White's *Pitchess* motion was erroneous and an abuse of discretion. This court reversed the judgment and remanded the matter with directions to the trial court to conduct an in camera inspection of personnel records of Officers Tapia, Ledesma, Mejia, Gonzalez, Brown, Chapman, Reyes, and Pozo for relevance. If that inspection revealed no relevant information, the trial court was directed to reinstate the judgment of conviction. If the inspection did reveal relevant information, the trial court was instructed to order disclosure, allow White an opportunity to demonstrate prejudice, and order a new trial if there was a reasonable probability that the outcome would have been different had the information been originally disclosed. If White failed to demonstrate prejudice, the trial court was directed to reinstate the judgment.

On remand the trial court conducted an in camera review, found 52 "*Pitchess* hits," and ordered disclosure of records it found relevant. The Los Angeles Police Department produced the requested information to White. White interviewed and

obtained declarations from 11 *Pitchess* witnesses: Willie Jones, Gwendolyn Hall, Donald Lee Mason, Patrick King, Maris Brooks, Clifton Semedo, Nathaniel Lewis, William Stephans, Mario Jordan, Darly Gray, and Anthony Davis.

Trial Court's Determination That White Did Not Suffer Prejudice From the Earlier Order Denying His Pitchess Motion:

On November 15, 2010, the trial court held a hearing to determine if White suffered prejudice from the earlier order denying his *Pitchess* motion.

After reviewing *Pitchess* witness affidavits, the trial court determined that none of those affidavits related to Officer Gonzalez. None of the affidavits reflected any citizen complaint filed against Officer Brown. Although he filed no citizen complaint against Brown, *Pitchess* witness Darly Gray[2] alleged that Brown engaged in misconduct in connection with Gray's arrest for sale of cocaine base. The trial court determined that the value to White of calling Brown as a witness in a possible retrial would be to bolster the testimony of *Pitchess* witness Edward Hall, who had testified in White's trial that Brown was part of an organization of officers that framed people, fabricated evidence, and committed perjury. The trial court determined that there would be some slight value with respect to Officer Brown because of *Pitchess* witness Darly Gray.

Of the six remaining police officers, Officers Chapman, Reyes, and Pozo did not testify in White's trial. The trial court determined that at best, in a possible retrial White would be calling Chapman, Reyes, and Pozo regarding the circumstances of White's arrest. White would then impeach the officers' testimony with the *Pitchess* witnesses' testimony about the officers' alleged misconduct. The prosecution, however, would then have three additional witnesses in support of their case, which would subtract from whatever impeachment value White might obtain from those three witnesses' testimony.

The three remaining police officers, Tapia, Ledesma, and Mejia, testified at White's trial; Edward Hall testified against Mejia and Troy Gray testified against Tapia and Ledesma. The *Pitchess* declarants had lodged three complaints against Tapia, two

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[2] Darly Gray is a different person than Troy Gray, a defense witness at trial.

complaints against Ledesma, and two complaints against Mejia. The trial court stated that in a retrial, one possibility would be that under Evidence Code section 352, the trial judge could exclude testimony by additional *Pitchess* witnesses against these three officers as cumulative evidence that would necessitate undue consumption of time. The trial court found that in the first trial evidence against White was overwhelming, and the jury took 23 minutes to find White guilty. Even if in a retrial the judge allowed additional *Pitchess* witnesses to testify against Tapia, Ledesma, and Mejia, it would not have reasonably changed the outcome of the first trial. The trial court reinstated the judgment.

Appeal:

White filed a timely notice of appeal.

ISSUE

White claims that the trial court erroneously found that the nondisclosure of police complaints before White's trial was harmless and erroneously reinstated the judgment rather than ordering a new trial.

DISCUSSION

1. *Standard of Review*

After a reversal of a judgment of conviction and conditional remand with directions to review *Pitchess* documents, if the trial court's inspection of requested personnel records contain no relevant evidence the trial court should reinstate the judgment. (*People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 3.) If the trial court determines on remand that relevant information exists and should be disclosed, the trial court must order disclosure and give the defendant the opportunity to determine if the information would have led to any relevant, admissible evidence that the defense could have presented at trial. The trial court must allow the defendant an opportunity to demonstrate prejudice. (*Id.* at p. 181; *People v. Hustead* (1999) 74 Cal.App.4th 410, 419.) The standard for the trial court to use to determine prejudice is whether there is a reasonable probability that the outcome would have been different had the information

been disclosed. (*People v. Johnson* (2004) 118 Cal.App.4th 292, 305; *People v. Gaines*, *supra*, 46 Cal.4th at pp. 182-183.)

2. *White Has Not Shown That Testimony By Additional Pitchess Witnesses Would Have Produced a More Favorable Verdict at Trial*

White claims on appeal there was a reasonable chance that testimony by the additional *Pitchess* witnesses could have produced a more favorable verdict at his trial, and that the trial court's analysis was flawed. We disagree.

A. *The Trial Court Determined Calling Three Additional Police Officers to Testify Would Support the Prosecution Case, Which Would Subtract From Any Impeachment Value to the Defense*

White first claims that the trial court was wrong when it found that the *Pitchess* witnesses did not allege misconduct against Officers Chapman, Reyes, and Pozo. Appellant White is correct. *Pitchess* witnesses did allege misconduct by Chapman, Reyes, and Pozo, who were among the "other officers" referred to in Tapia's arrest report.[3] As we previously stated, however, the trial court determined that because Chapman, Reyes, and Pozo did not testify in White's trial, in a possible retrial White would call Chapman, Reyes, and Pozo so he could impeach their testimony by testimony from *Pitchess* witnesses. The trial court concluded that by calling Chapman, Reyes, and Pozo, White would give the prosecution three additional witnesses in support of its case, which would subtract from whatever impeachment value White would obtain from testimony by Chapman, Reyes, and Pozo. We agree with the trial court's conclusion.

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[3] Citing Evidence Code section 1101, subdivision (b), White describes Officers Chapman, Reyes, and Pozo as part of a team whose modus operandi was to falsify cases against people in the area of downtown Los Angeles where he was arrested. He argues that the *Pitchess* witnesses' allegations of misconduct by these officers were relevant to establish that misconduct, even though those allegations were directed at these officers who did not testify at White's trial. White did not make this Evidence Code section 1101, subdivision (b) argument in the trial court, and therefore forfeits this claim of error on appeal. (*People v. Abel* (2012) 53 Cal.4th 891, 929.)

B. *The Trial Court Properly Found That the Probative Value of Evidence From the 11 Pitchess Witnesses Was Outweighed by the Probability That Its Admission Would Necessitate Undue Consumption of Time Under Evidence Code Section 352*

The trial court found that the *Pitchess* witnesses' evidence would be cumulative of testimony by trial witnesses Edward Hall and Troy Gray, who had testified that the officers were part of an organization that framed people, fabricated evidence, and committed perjury, and that the officers were known to lie and plant drugs. The *Pitchess* witnesses' affidavits contained these allegations, and introducing testimony from the 11 *Pitchess* witnesses, with cross-examination and impeachment of those witnesses, would consume a great deal of trial time. The trial court properly found that the probative value of evidence from these 11 witnesses would necessitate undue consumption of time under section 352.

C. *There Was No Error in the Trial Court's Determination That the Evidence Against White Was Overwhelming, and That if Pitchess Evidence Had Been Disclosed There Was Not a Reasonable Probability of a Different Outcome in White's Trial*

White claims that the trial court erroneously found the evidence against him to be overwhelming. White argues that the only evidence of his criminal conduct was the testimony of Officers Tapia, Ledesma, Mejia, and Gonzalez, the evidence was overwhelming only to the extent the jury believed their testimony, and that the *Pitchess* witnesses called the officers' credibility into question by evidence of their prior misconduct.

The trial court found that the trial evidence against White was overwhelming, that the jury took only 23 minutes to find White guilty, and that even if all newly discovered *Pitchess* witnesses had testified, it would not reasonably have changed the outcome of White's trial. The trial judge was applying the test in *People v. Gaines, supra,* 46 Cal.4th 172. "[A] defendant who has established that the trial court erred in denying *Pitchess*

discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed." (*Id*. at p. 182.)

Two defense witnesses gave testimony that called the police officers' credibility into question. Witness Edward Hall stated that Mejia, Brown, Green, and Hoffman were part of an organization of police officers which framed people, fabricated evidence, and committed perjury; and that Mejia testified falsely against Hall and fabricated a police report, and ordered another police officer to take Hall to the police station even though a search of Hall produced no narcotics. Witness Troy Gray testified that Tapia, Ledesma, and Green had been known to lie and plant drugs, that Tapia and Ledesma ordered the illegal search and detention of Gray, and that the arresting officers planted drugs on Hall.

Testimony by the 11 *Pitchess* witnesses would have limited value to the defense, because the prosecution would have been able to impeach nine of the 11 *Pitchess* witnesses with evidence that they had previous convictions or were incarcerated at the time of their affidavits.[4] *Pitchess* witness Gwendolyn Hall admitted purchasing marijuana illegally. *Pitchess* witness Lewis alleged misconduct against Officers Chapman and Reyes, who did not testify at trial. Lewis's proffered testimony would not have impeached the testimony of Tapia, Ledesma, or Mejia.

We reiterate that it was also unlikely that a trial court would permit testimony by 11 *Pitchess* witness, whose examination by defense counsel and cross-examination by the

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[4] Jones was convicted of possession of cocaine base for sale and was incarcerated at the time of his affidavit. Mason was convicted of a narcotics offense and was incarcerated at the time of his affidavit. King was on parole from a prior conviction when he was arrested, and pleaded guilty to a narcotics offense. King was convicted of selling narcotics and was incarcerated at the time of his affidavit. Brooks had a history of narcotics convictions and was incarcerated at the time of his affidavit. Semedo was incarcerated at the time of his affidavit. Stephans had just been released from prison and was on parole when the police misconduct he alleged in his affidavit occurred. Jordan was on parole from a second degree robbery conviction when the police misconduct he alleged in his affidavit occurred. Darly Gray on parole from a conviction for possession of cocaine when the police misconduct he alleged in his affidavit occurred, and was incarcerated at the time of his affidavit. Davis was incarcerated at the time of his affidavit awaiting trial on a charge of possession for sale of heroin and cocaine.

prosecution would take up many days of trial time. The trial court would likely determine that the probative value of evidence from 11 *Pitchess* witnesses was outweighed by the probability that its admission would necessitate undue consumption of time under Evidence Code section 352.

We find no error in the trial court's determination that the evidence against White was overwhelming, or in its determination that if the *Pitchess* evidence had been disclosed there was not a reasonable probability of a different outcome in White's trial.

D. *White Has Not Shown Prejudice From the Delay in Pitchess Discovery*

White was tried in 2006, but *Pitchess* discovery was not provided to him until 2009. He argues that in assessing prejudice, the court should consider the possibility that if the delayed production of *Pitchess* discovery had not occurred, he might have been able to produce additional *Pitchess* witnesses. He notes that the trial court identified 52 complaints against the named police officers by 35 complainants, but he was only able to obtain declarations from 11 of them.

As White concedes, the possibility that he might have been able to locate more complainants in 2006 was speculative. In his showing of prejudice in the trial court, White did not make the argument that the delay in *Pitchess* discovery prejudiced him. Moreover, delay in *Pitchess* discovery appears to have increased the number of *Pitchess* witnesses. *Pitchess* discovery in 2006 would have resulted in fewer complaints and complainants. Four of the 11 *Pitchess* witnesses (Semedo, Stephans, Jordan, and Davis) alleged police misconduct occurring after 2006. Thus the delay appears to have increased the number of complaints and complainants who alleged police misconduct.

Notwithstanding this fact, the standard for determining prejudice for failure to grant *Pitchess* discovery is whether there was a reasonable probability the outcome of the trial would have been different had the information been disclosed. (*People v. Johnson, supra,* 118 Cal.App.4th at p. 305.) *Pitchess* witnesses alleging police misconduct which had not occurred at the time of trial could not have been disclosed and would not have affected the outcome of the trial.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.